United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4105

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4105
75-4113
75-4118

ITT WORLD COMMUNICATIONS, INC., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

TRT TELECOMMUNICATIONS CORPORATION, et al.,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

The petitioners in these consolidated review proceedings are ITT World Communications, Inc., RCA Global Communications, Inc., and Western Union International, Inc.-- the three dominant international record communications common carriers (IRCs) doing business in this country. They seek review of an order of the Federal Communications Commission which permitted TRT Telecommunications Corp., a fourth IRC, to offer international telex service to the United Kingdom and West Germany at a reduced rate during

"off-peak" hours for a six-month experimental period to test the market for off-peak reductions. TRT Telecommunications Corp., 53 FCC 2d 649 (1975) (A. 1-9).

QUESTION PRESENTED

Where the Commission permitted a reduced rate for international telex service during off-peak hours to go into effect for a six-month experiment to test the market for off-peak reductions, was the action unlawful because off-peak hours were determined according to Eastern time and users in other time zones could obtain a reduced rate during business hours?

COUNTERSTATEMENT OF THE CASE

The international record carriers, like domestic interstate telephone companies, are subject to the regulatory scheme set forth in the Communications Act for interstate and foreign common carriers. Their service offerings must be described in tariffs filed with the FCC, 47 U.S.C. §203; and the rates, practices and regulations must be just and reasonable, 47 U.S.C. §201, and free of unjust or unreasonable discrimination or preferences, 47 U.S.C. §202.

Rate changes typically are initiated by the carriers in tariff filings, and the Commission's authority for dealing with them is outlined in some detail. 47 U.S.C. §§204, 205. Either on complaint or on its own motion, the

Commission may initiate a hearing to determine the lawfulness of the rates, and, in the interim, suspend the effective date of the rate change up to 90 days. At the end of the hearing, it may find the rates unlawful and either prescribe lawful rates or permit the carrier to make a different filing that is responsive to the finding of unlawfulness. If the suspension period ends before the hearing is completed, the new rates go into effect by operation of law. Id. See American Telephone & Telegraph Co. v. FCC, 487 F.2d 865 (2d Cir. 1973). The Commission also may reject summarily a tariff filing that is unlawful on its face. Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971). Cf. Municipal Light Boards v. FPC, 450 F.2d 1341 (D.C. Cir. 1971).

TRT, one of the four major American international record carriers, filed tariff revisions with the Commission on March 24, 1975, which offered telex service between the United States and two foreign countries at a reduced rate during "off-peak" hours.[1/] The reduced rate was $2.00 per minute, as compared with the regular rate of $2.55 per minute. It was to be available after 7 p.m. and until 9 a.m. Eastern

1/ Telex service permits a subscriber to communicate directly from a teleprinter on his own premises to another teleprinter on the premises of the party he wishes to contact. The two stations achieve contact through a switching system analogous to a telephone exchange. The communications are printed, or "record," messages. Charges are based on the duration of the call, at a fixed rate per minute. The service involved in this proceeding is international telex service provided principally by the three petitioners and TRT, often through interconnection with the Western Union Telegraph Company. Western Union, the domestic telegraph company, has no corporate links with petitioner Western Union International.

time on weekdays, and during weekends. The offering was experimental only, for a period of six months, and it covered service only from the United States to the United Kingdom and from the United States to West Germany. It was to become effective May 1, 1975. Transmittal No. 684, March 24, 1975 (A. 10-36). TRT supported its tariff with cost and other data, as required by the Commission's rules. 47 CFR §61.38.

ITT, RCA Globcom and WUI all filed oppositions, arguing primarily that the use of Eastern time to determine off-peak hours in all time zones created a discrimination. ITT Petition for Suspension and Investigation (A. 37-47); RCA Petition to Reject (A. 89-106); WUI Petition for Rejection (A. 69-87); WUI Petition for Suspension and Investigation (A. 49-67). 2/

TRT argued in response that the Communications Act does not forbid all discrimination in rates, but only that which is unjust or unreasonable. The discrimination here--in light of the limited duration of the test, TRT's minimal share of the market, and the prohibitive cost of reprogramming computers for this short test to impose

2/ ITT, which filed the principal brief for petitioners in this Court arguing that the Commission erred in failing to reject, did not ask the Commission to reject. Its only prayer for relief was that the Commission suspend TRT's tariff for 90 days and investigate its lawfulness. (A. 47).

the new rate on a local-time basis--was reasonable, TRT argued. In addition, the experiment would provide actual experience with off-peak rates, which would help the Commission determine whether a permanent offering would serve the public interest. TRT Reply (A. 108-21). TRT Opposition to Petitions for Rejection (A. 123-31).

Acting pursuant to delegated authority, 3/ the chief of the Commission's Common Carrier Bureau suspended the effective date of the rate reduction for 30 days, until May 31, 1975, to permit the staff to consider the questions raised in the exchange of pleadings. TRT Telecommunications Corp., Mimeo No. 49571, May 2, 1975 (A. 133-134). The Commission did not act further before the suspension ran out, and the off-peak rate became effective on May 31 by operation of law. 47 U.S.C. §204. The Commission on June 6 released its order denying the IRCs' petitions to suspend or reject. TRT Telecommunications Corp., 53 FCC 2d 649 (A. 1-9). The Commission found that the "marketplace test" provided by TRT's experiment would be more useful than an evidentiary hearing in helping the Commission determine whether a permanent off-peak offering would serve the public interest. It found that both the

3/ The delegation of authority to suspend was subsequently deleted from the delegation rule. 47 CFR §0.291(d), effective August 22, 1975.

short term of the test and TRT's small share of the telex traffic to the United Kingdom and West Germany would minimize the chance for harm. 53 FCC 2d at 653 (A. 6, 7).

The Commission did not deny that the use of Eastern time was discriminatory, and it stated that it "would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering." Id. at 654 (A. 7). But it agreed with TRT that it would not be worth the additional cost "to require TRT to reprogram its billing computer for a six month experiment" to adhere to local time. Id. Thus, the Commission did not find the discrimination to be unjust or unreasonable in the experimental context of this tariff offering, and it found the experiment to be in the public interest. The Commission imposed reporting requirements on TRT to "maximize the value of the experiment." Id. 4/ (A. 8).

4/ In the meantime, on May 30, the IRCs had applied to the Commission for special permission to match TRT's off-peak rate by filing tariffs effective on one day's notice, or on June 1. Special permission was required because the Communications Act permits rate changes only after 30 days' notice, unless the Commission in its discretion modifies the notice requirement. 47 U.S.C. §203(b). The requests relied solely upon "competitive necessity" as justification for waiver of the notice period. TRT opposed the applications and the tariff filings. By letters dated June 16, 1975, the Commission denied special permission to waive the notice requirement. By order released June 30, the Commission denied TRT's opposition to the matching rates and permitted the IRCs' tariffs to go into effect on the expiration of the statutory notice period. ITT World Communications, Inc., 53 FCC 2d 1176 (1975) (A. 153-56).

Petitions for review were filed by ITT on June 5, by RCA on June 12, and by WUI on June 20. ITT also filed a motion on June 5, asking the Court to stay either the TRT tariff or the Commission's alleged action denying ITT's request for special permission to match TRT's rate on one day's notice. The Commission opposed the stay and moved for dismissal of the ITT petition on grounds that it did not challenge final agency action that was ripe for review within the meaning of the relevant statutes. After hearing argument, this Court denied both motions.[5/]

The original term of the experiments expired on November 30, 1975, and all four of the carriers had them extended. TRT's off-peak rate now is due to expire on February 29. The other IRCs have an expiration date of January 31. TRT has filed a new tariff for telex service to the United Kingdom, which would reduce the rate to $2.00 per minute around the clock. The new rate would become effective February 1, 1976, unless the Commission suspends

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5/ The Commission adheres to its position that ITT did not properly invoke the Court's jurisdiction because there was no final agency action as of June 5, the date on which ITT filed its petition for review. We believe also that ITT's attempt to amend the petition on June 10 should be unavailing, because the initial filing was fatally defective. See FCC Motion to Dismiss. Although the Court's jurisdiction was properly invoked by RCA and WUI in subsequent petitions which have been consolidated with the ITT petition, the Commission renews its request that the ITT petition be dismissed. 47 U.S.C. §402(a); 28 U.S.C. §2342.

or rejects the tariff filing. The other IRCs all have opposed TRT's United Kingdom rate reduction.

ARGUMENT

The only issue in this case is the validity of the Commission's decision to permit TRT's off-peak rate to go into effect for a six-month experiment and to deny the petitions to suspend or reject the rate on grounds of unlawful discrimination. The petitioners concede that the second issue raised initially in their petitions for review and motion for stay--whether TRT's competitors were entitled to file matching rates--was mooted by the Commission's decision to permit the matching rates to become effective. (ITT Br. p. 9).

THE COMMISSION'S DECISION TO PERMIT TRT'S OFF-PEAK TELEX RATE TO BECOME EFFECTIVE WAS A LAWFUL EXERCISE OF AUTHORITY, BECAUSE THE RATE DISCRIMINATION BETWEEN USERS IN DIFFERENT TIME ZONES COULD PROPERLY BE FOUND REASONABLE IN LIGHT OF THE LIMITED TERMS OF THE EXPERIMENT AND THE PUBLIC INTEREST BENEFITS EXPECTED TO RESULT FROM IT.

Section 202(a) of the Communications Act makes it unlawful for a carrier to make "any unjust or unreasonable discrimination," or to give "any undue or unreasonable preference," or to subject customers to "any undue or unreasonable prejudice or disadvantage." 6/ As is plain

6/ Section 202 is reproduced in an addendum to this brief, along with other relevant statutes.

from the explicit language of the statute, "not every variation in prices charged customers for a particular feature of the carrier's service supports a claim of unlawful discrimination." Associated Press v. FCC, 452 F.2d 1290, 1300 (D.C. Cir. 1971). To find unlawfulness, the Commission not only must perceive a disparity in rates, but also must conclude that the disparity is not reasonable in the circumstances.

This is the unanimous, and inevitable, interpretation given to Section 202(a). Thus, this Court in AT&T v. FCC, 449 F.2d 439 (1971), and National Association of Motor Bus Owners (NAMBO) v. FCC, 460 F.2d 561 (1972), reviewing Commission decisions on rate discrimination, referred repeatedly to the issue as the reasonableness or lawfulness of the discrimination--not simply whether a discrimination existed. Explicit in both opinions was the proposition that discrimination could be justified, on a showing of competitive necessity or some other circumstance making the price differential reasonable. 7/

7/ See, e.g., American Trucking Associations v. FCC, 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967). Petitioner's citation of this case for the proposition that Section 202(a) "admits of no exceptions" disregards the entire thrust of the D.C. Circuit's analysis. (ITT Br. p. 12.) In American Trucking Associations, that Court affirmed the Commission's finding that two classes of TELPAK (bulk private line services) rates were unreasonably

(footnote continued on next page)

In determining the reasonableness of the disparity in rate treatment here,[8] the Commission looked to the duration of the experimental period, TRT's share and likely effect on the market, the desirability of obtaining data on the market for off-peak reductions, and the cost of eliminating the rate disparity. In the light of these factors, the Commission determined that there was no basis for finding unreasonable discrimination on the face of the tariffs and that rejection therefore was unwarranted.

7/ (continued from previous page)
discriminatory because the carrier had not justified them either by cost differences or by showing competitive necessity. If the prohibition were absolute, as ITT contends, the Court would not have reviewed the Commission's scrutiny of attempts to justify the rate differential. In any event, the D.C. Circuit made clear in its subsequent decision in Associated Press v. FCC, 452 F.2d 1290, 1300-01 & n.85-86, that its American Trucking Associations case did not make "the mere existence of disparity between particular rates" a statutory violation. See also AT&T, 55 FCC 2d 224 (1975), review pending sub nom. Commodity News Services v. FCC, No. 75-2057, D.C. Circuit, where the Commission stated that it did not preclude carriers from presenting public interest reasons "which would render a discrimination just and reasonable." This has been the Commission's consistent view.

8/ ITT's brief makes it abundantly clear that West Coast users, for example, will be able to get reduced rates during the latter part of their business day, whereas East Coast users must wait until after 7 p.m. On the other hand, however, East Coast users will have the opportunity to exploit favorable rates until 9 a.m. Surely this offsetting advantage to East Coast users counts for something. Significantly absent from this case, moreover, are intervenors representing East Coast users who feel they are victims of discrimination. Users in the past have taken to the courts to protect their own interests against perceived discriminations. See, e.g., NAMBO, supra; Associated Press, supra; American Trucking Associations, supra.

Municipal Light Boards v. FPC, 450 F.2d 1341; Associated Press v. FCC, 448 F.2d 1095. Cf. AT&T v. FCC, 487 F.2d 865.

The experimental period was brief. The Commission wanted a "marketplace test" of off-peak rates to determine whether a permanent offering would serve the public interest. 53 FCC 2d at 653 (A. 6). Its decision to permit the test was fully consistent with its obligation under the Act to make available a nationwide and worldwide communications system at reasonable charges, 47 U.S.C. §151; to perform such acts as are necessary to carry out its functions, 47 U.S.C. §154(i); and to experiment with and encourage the larger use of communications facilities in the public interest, 47 U.S.C. §303(g).[9/] The Commission relied not only on the brevity of the test

9/ ITT's argument that the Commission's authority to experiment is limited to broadcast is plainly wrong. (ITT Br. p. 19 & n. **.) First, radio technology is not limited to broadcast, and the common carrier provisions of the Act repeatedly refer to the radio provisions of Title III as applicable to common carrier licensing. See, e.g., 47 U.S.C. §§152(b), 221(b). Second, the Commission's broad authority to experiment and the deference to which its temporary, experimental actions are entitled have been recognized in cases covering the spectrum of communications technology. See, e.g., National Association of Regulatory Utility Commissioners (NARUC) v. FCC, ____ U.S. App. D.C. ____, 525 F.2d 630 (1976) (frequency allocation and regulatory policies for common carrier activities); American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975) (decision not to regulate public access channels on cable systems as common carriers); Connecticut Committee against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir. 1961) (experimental authorization to operate subscription television station). Finally, the courts have held repeatedly that the Commission's authority is not "rigidly compartmentalized" into radio licensing and common carrier regulation functions. E.g., NARUC, 525 F.2d at 644; ACLU v. FCC, 523 F.2d at 1351.

period, but also on TRT's small share of the telex market to the two countries as insurance that no disruption of traffic patterns would occur. 53 FCC 2d at 653 (A. 6).

More specifically addressing itself to discrimination, the Commission found that TRT's selection of Eastern time as the basis for its rate was reasonably related to its traffic patterns, which indicated that 84 per cent of TRT's telex traffic to the two countries, regardless of where it originated, was transmitted between 9 a.m. and 7 p.m. Eastern time--the period excluded from the rate reduction. 53 FCC 2d at 654 (A. 7). Finally, the Commission agreed with TRT that the cost of reprogramming its billing computer to apply the reduction on the basis of local peak times was not justified for so short an experiment. Id.[10/] [11/]

10/ When the competing IRCs, petitioners in this Court, filed their matching rates, they unanimously argued to the Commission that the cost of reprogramming their computers made it impracticable to offer their off-peak rates on the basis of local peak times. See Exhibits 1-4, attached to TRT's Supplemental Memorandum in Opposition to Stay, filed in this Court on June 12, 1975 (A. 141, 144, 150).

11/ RCA's separate argument based on the Uniform Time Act of 1966, 80 Stat. 107, is barred by Section 405 of the Communications Act, 47 U.S.C. §405, because the argument was not raised before the Commission in the first instance or in a petition for reconsideration. Herman Gross v. FCC, 480 F.2d 1288, 1290n.5 (2d Cir. 1973). In any event, the argument tends only to show that local time normally would govern tariff offerings, a fact conceded by the Commission. It bears not at all on the real question--the reasonableness of the discrimination in this experimental context.

The D.C. Circuit has set forth the proper scope of judicial inquiry in cases where the Commission has exercised its authority on matters of short duration but with promise of providing enlightening experience:

> This court has recognized that there are circumstances in which "a month of experience will be worth a year of hearings." . . . [T]he court's inquiry into the factual underpinnings of agency action authorizing a temporary program or giving it interim approval will appropriately be less searching [than] if we were faced with the institution of a permanent program. For . . ., "the very purpose of the projected experiment is to explore these unknown and unpredictable factors."

United Telegraph Workers v. FCC, 436 F.2d 920, 925-26 (D.C. Cir. 1970) (citations omitted).

CONCLUSION

The Commission permitted TRT's rate reduction to go into effect for a limited time for legitimate regulatory purposes, and with due consideration of its reasonableness. The competing IRCs were not entitled to have the tariff rejected because they had not shown that it was unlawful on its face. While the Commission stated that it would require "further justification" for any permanent service

offering, it was unable to find an unlawful discrimination. The Commission's action should be affirmed.

Respectfully submitted,

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ADDENDUM

Relevant Provisions of Communications Act:

ADDENDUM

DISCRIMINATION AND PREFERENCES

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.[29]

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

SCHEDULES OF CHARGES

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless

schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

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TRT TELECOMMUNICATIONS CORPORATION, et al., Intervenors.	)	

CERTIFICATE OF SERVICE

I, Mary C. Ross, hereby certify that the foregoing printed "Brief for Respondents" was served this 4th day of February, 1976, by mailing true copies thereof, to the following persons at the addresses below:

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